JUL 8

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 92

JOHN E. MADDEN, JR., EXECUTOR OF THE ESTATE OF JOHN E. MADDEN, DECEASED,

Appellant,

vs.

COMMONWEALTH OF KENTUCKY, BY JAMES W. MARTIN, COMMISSIONER OF REVENUE OF THE COMMONWEALTH OF KENTUCKY.

APPEAL FROM THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY.

STATEMENT AS TO JURISDICTION.

WILLIAM MARSHALL BULLITT,
Counsel for Appellant.

BRUCE AND BULLITT,
Of Counsel.

INDEX.

Subject Index.

	Page
Statement as to jurisdiction	1
Nature of the case	1
Statutory provisions believed to sustain the jurisdiction	2
Statute of the State the validity of which is involved	3
The date of the judgment or decree sought to be reviewed and the date of the application for appeal	4
The Federal questions raised	5
Exhibit "A"—Opinion of the Court of Appeals of the Commonwealth of Kentucky on the first appeal	9
Exhibit "B"—Opinion of the Court of Appeals of the Commonwealth of Kentucky on the second appeal	18

Table of Cases Cited.

Colgate v. *Harvey*, 296 U. S. 404	7
Commonwealth v. *Madden's Executor*, 265 Ky. 684, 97 S. W. (2d) 561	8
Madden's Executor v. *Commonwealth of Kentucky*, 277 Ky. 343, 126 S. W. (2d) 343	8

Statutes Cited.

Carroll's Kentucky Statutes, Baldwin's Revision, 1930, Section 4019, p. 2048 (Ky. Acts 1924, ch. 116, Section 1, p. 403, as reenacted in Ky. Acts 1926, ch. 164, p. 739)	3
Carroll's Kentucky Statutes, Baldwin's Revision, 1930, Section 4019a-1, pp. 2049-2050 (Ky. Acts 1924, ch. 116, Sec. 8, p. 413)	4
Carroll's Kentucky Statutes, Baldwin's Revision, 1930, Section 4019a-10, p. 2052 (Ky. Acts 1924, ch. 116, Section 3, p. 407)	2, 3
Constitution of the United States, Article IV, Section 2	2, 6
Constitution of the United States, 14th Amendment, Section 1	2, 6
Judicial Code, Section 237a (28 U. S. C. 344a), as amended by the Act of January 31, 1928 (45 Stat. 54)	2, 3

COURT OF APPEALS OF KENTUCKY

SPRING TERM, 1939

No. 65436

JOHN E. MADDEN, JR., EXECUTOR OF THE ESTATE OF JOHN E. MADDEN, DECEASED,

Appellant,

vs.

COMMONWEALTH OF KENTUCKY, BY JAMES W. MARTIN, COMMISSIONER OF REVENUE OF THE COMMONWEALTH OF KENTUCKY,

Appellee.

SEPARATE STATEMENT AS TO JURISDICTION REQUIRED BY PARAGRAPH 1 OF RULE 12 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

John E. Madden, Jr., Executor of the Estate of John E. Madden, deceased (hereinafter called the Executor), in connection with his appeal to the Supreme Court of the United States from the final judgment and decision of the Court of Appeals of Kentucky in the above entitled cause, rendered on March 10, 1939, submits this, his separate statement as to jurisdiction required by paragraph 1 of Rule 12 of the Revised Rules of the Supreme Court of the United States.

This is a suit by the State of Kentucky against the Executor to collect *ad valorem* taxes on moneys deposited in banks located outside the State of Kentucky, to-wit: In New York banks, during the years 1924 to 1925, inclusive, by John E. Madden, deceased, who was a citizen of the State of Kentucky. The Court of Appeals of Kentucky has construed Kentucky Statutes (Ky. Stat. sec. 4019a-10) as requiring the Executor to pay taxes upon such moneys so deposited by his decedent in banks located outside the State of Kentucky at the rate of 50 cents upon each $100 thereof, whereas by Kentucky Statutes, Section 4019a-1, moneys deposited in banks within the State of Kentucky are taxed at the rate of only 10 cents upon each $100 thereof.

The Court of Appeals of Kentucky held in such decision, against the contention of the Executor, that such Kentucky Statutes, as construed by it, requiring the payment of taxes at a higher rate upon moneys deposited in banks located outside the State of Kentucky than is required upon money deposited in banks located within the State of Kentucky, by residents thereof, do not violate the privileges and immunities clauses of Article IV, Section 2, or the Fourteenth Amendment, Section 1, of the Constitution of the United States, and that such Statutes, as so construed, do not violate the equal protection or due process clauses of the Fourteenth Amendment, Section 1 of the Constitution of the United States; and the decision and judgment of the Court of Appeals of Kentucky sustained the tax against the Executor, and such court rendered its decision in favor of the legality of the tax, and the validity of such Statutes of the State of Kentucky, as so construed by it.

(a) The Statutory Provisions Believed to Sustain the Jurisdiction.

The case is one in which under the legislation in force when the Act of January 31, 1928 (45 Stat. 54), was passed,

to-wit: Under Section 237a of the Judicial Code, 28 U. S. C., Sec. 344 (a), a review could be had in the Supreme Court of the United States on a writ of error as a matter of right.

(b) The Statutes of the State, the Validity of Which is Involved.

Carroll's Kentucky Statutes, Baldwin's Revision, 1930, Section 4019a-10, p. 2052 (Ky. Acts 1924, ch. 116, section 3, p. 407) provides that

> "All property subject to taxation for state purposes shall be subject also to taxation in the county, city, school or other taxing district in which same has a taxable situs, except the following classes of property, which shall be subject to taxation for state purposes only: * * *.
>
> "(4) Money in hand, notes, bonds, accounts or other credits, whether secured by mortgage, pledge or otherwise, or unsecured, and shares of stock; * * *"

The rate applicable to the taxation of such property for State purposes (for the years in question) as provided by Carroll's Kentucky Statutes, Baldwin's Revision, 1930, Section 4019, p. 2048 (Ky. Acts 1924, ch. 116, section 1, p. 403, as reenacted in Ky. Acts 1926, ch. 164, p. 739), is as follows:

> "An annual ad valorem tax for state purposes of thirty (30¢) cents upon each one hundred ($100.00) dollars of value of all real estate directed to be assessed for taxation, as provided by law, and fifty (50¢) cents upon each one hundred ($100.00) dollars of value of all other property directed to be assessed for taxation, as provided by law, shall be paid by the owner, person or corporation assessed; except a tax at the rate of one-tenth of one (1%) per cent shall be paid annually upon the amount of deposits in any bank, trust company, or combined bank and trust company, organized under the laws of this State, or in any national bank of this State, as now provided by law; * * *."

Carroll's Kentucky Statutes, Baldwin's Revision, 1930, Section 4019a-1, pp. 2049-2050 (Ky. Acts 1924, ch. 116, sec. 8, p. 413), provides as follows with respect of tax on bank deposits:

> "Every person, firm or corporation having, on the first day of July, a deposit in any bank, trust company, or combined bank and trust company, organized under the laws of this State, or in any national bank of this State, shall pay a tax to the State which is hereby assessed at the rate of one-tenth of one per cent annually, upon the amount of such deposit so held by such bank on the first day of July, and no deductions therefrom should be made on account of any indebtedness. * * *"

The Court of Appeals of Kentucky construed the above quoted Kentucky Statute, Sections 4019a-10, as requiring citizens of Kentucky to pay taxes at the rate of 50 cents upon each $100.00 of moneys deposited in banks located outside the State of Kentucky, to-wit: at the rate provided by the above quoted Kentucky Statute, Section 4019, and the validity of such Statutes, as so construed, is challenged by the Executor.

(c) The Date of the Judgment or Decree Sought to be Reviewed and the Date of the Application for Appeal.

The Court of Appeals of Kentucky, which is the highest Court of Kentucky, rendered the decision and judgment sought to be reviewed on March 10, 1939, affirming the judgment of Fayette Circuit Court, which had been entered on January 22, 1938; and on May 9, 1939 the Executor applied for and was allowed this appeal.

The March 10, 1939 opinion of the Court of Appeals of Kentucky, a copy of which is appended hereto, was in favor of the validity of Kentucky Statutes (Secs. 4019a-10 and 4019, above quoted), as construed by it, and against the contention of the Executor that such Statutes were repugnant

to, and in violation of, the privileges and immunities clauses of Article IV, Section 2, and the Fourteenth Amendment, Section 1 of the Constitution of the United States.

The Federal Questions Raised.

The Executor, in his amendment to the answer, filed June 26, 1937, pleaded as follows:

> "If Kentucky Statutes * * * 4019 and 4019-1, or other statutes of the State of Kentucky relating to taxation upon the amount of deposits in banks, are construed to require the assessment at the rate of five-tenths of one per cent upon money deposited in state or national banks outside of Kentucky, and at the rate of only one-tenth of one per cent of the amount of deposits within the State of Kentucky, such construction of the said statutes will have the effect of making such statutes invalid and unconstitutional (1) in violation of Section 2 of Article IV of the Constitution of the United States, which provides that
>
> "'The citizens of each state shall be entitled to all privileges and immunities of citizens of the several states;'
>
> and (2) in violation of the Fourteenth Amendment, sec. 1 to the Constitution of the United States, which provides that
>
> "'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; * * *'.
>
> "The decedent, John E. Madden, was a citizen of the United States and of the State of Kentucky, and if he, or his estate, is required to pay taxes at a higher rate on bank deposits outside the State of Kentucky than are assessed under the statutes of the State of Kentucky for bank deposits made within the State of Ken-

> tucky, he, and his estate, will have been, as a result of such statutes so construed, denied the privileges and immunities of citizens of the United States; * * *."

The Executor also requested the trial court at the trial on June 26, 1937, to make conclusions of law, and the court did make conclusions of law as follows, to-wit:

> "1. The decedent, John E. Madden, was a citizen of the State of Kentucky, and under the Constitution of the United States, Article IV, Section 2, and the Fourteenth Amendment thereto, Section 1, no state law can be made or enforced which will abridge the privileges and immunities of a citizen of the United States. The assessment and collection of taxes by the State of Kentucky upon bank accounts kept by a citizen thereof in banks outside the State of Kentucky, at a higher rate than that applied to bank accounts kept within the State of Kentucky, is discriminatory and violates the said provisions of the Constitution of the United States,"

but the court nevertheless entered a judgment on January 22, 1938, against the Executor for the amount of *ad valorem* taxes claimed by the State of Kentucky on the New York bank accounts at the higher rate of 50 cents on each $100 thereof.

Thereupon, the Executor filed a motion for a new trial and again urged the Court to set aside the judgment on the ground that the discriminatory tax violated Article IV, Section 2, and the Fourteenth Amendment, Section 1, to the Constitution of the United States.

In the March 10, 1939, opinion of the Court of Appeals of Kentucky, it said:

> "After pleading (the admitted fact) that decedent was a citizen of the United States, and a citizen and resident of Kentucky, appellant averred that to construe the statutes so as to impose the higher rate on deposits in foreign banks than on deposits in domestic

banks, as we had done, violated Section 2 of Article 4 of the United States Constitution, and Section 1 of the 14th Amendment, which respectively provide in part:

> " 'The citizens of each state shall be entitled to all privileges and immunities of citizens of the several states, * * *. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States!"

The Executor contends, and he did contend in the trial court, and in the Court of Appeals of Kentucky, that the Kentucky Statutes, as construed by the Court of Appeals of Kentucky, in requiring Kentucky citizens to pay taxes of 50 cents upon each $100 of money deposited in banks located outside of Kentucky, whereas the rate of taxation upon moneys deposited in banks located within the State of Kentucky is only 10 cents upon each $100, violates the constitutional rights of citizens of the United States guaranteed to them by Article IV, Section 2, and by the Fourteenth Amendment, Section 1, of the Constitution of the United States, in that such statutes abridge the privileges and immunities of citizens of the United States.

In *Colgate* v. *Harvey*, 296 U. S. 404, 426, *et seq.*, this Court held invalid a Vermont statute which taxed the income from certain interest-bearing securities, but exempted income on certain moneys loaned within the State on the ground that the Act abridged the privileges and immunities of citizens of the United States, and that case sustains the jurisdiction of the Executor's appeal herein.

The questions involved are substantial because if the decision of the Court of Appeals of Kentucky is permitted to stand, citizens of that State who are also citizens of the United States can be prohibited from depositing their money in banks located outside the State of Kentucky by the imposition of a discriminatory tax upon such money deposited outside the State. In this case, the rate of taxation applied

to deposits made outside the State by citizens of the State is five (5) times the rate of taxation applied to money deposited in banks located within the State. No justifiable purpose can be accomplished by such discriminatory taxation; and the only conceivable purpose to be accomplished is to prohibit citizens of the State from depositing their money in banks located outside the State, and that unjustifiable purpose can be accomplished only to the extent that the discriminatory taxation operates to prohibit the deposit of money in banks located outside the State. Consequently, the question presented is the power of a State to prohibit its citizens from exercising the rights which they have as citizens of the United States to do business on equal terms throughout the United States.

The Executor files herewith (1) a copy of the opinion on the first appeal to the Court of Appeals of Kentucky (*Commonwealth* v. *Madden's Executor*, 265 Ky. 684, 97 S. W. (2d) 561, decided June 23, 1936), reversing the judgment of the trial court in favor of the Executor and remanding the case for the further proceedings which resulted in (2) the opinion on the second appeal to the Court of Appeals of Kentucky (*John E. Madden's Executor* v. *Commonwealth of Kentucky, etc.*, 277 Ky. 343, 126 S. W. (2d) 343, decided June 10, 1939), marked Exhibits "A" and "B", respectively.

The Executor files herewith his assignment of errors as to such final decision of the Court of Appeals of Kentucky.

(Signed) BRUCE & BULLITT,
Counsel for John E. Madden, Jr.,
Executor of the Estate of John
E. Madden, Deceased.

EXHIBIT "A".

Court of Appeals of Kentucky Decisions.

Commonwealth v. Maddens' Executor, 265 Ky. 684; 97 S. W. (2d) 561.

(Decided June 23, 1936.)

Appeal from Fayette Circuit Court.

1. Taxation.—Situs for ad valorem taxation of partnership assets which were invested and reinvested on New York Stock Exchange by Kentucky partner, who spent greater part of each year in New York, was in New York.

2. Taxation.—Business of partnership engaged in operations on New York Stock Exchange was localized in New York, and hence Kentucky partner's interest in partnership assets was beyond power of Kentucky to tax, where partnership accounts were carried with brokers in New York, securities purchased and sold were carried in names of New York brokers, and the trading was almost universally carried on in person by Kentucky partner at brokerage offices in New York.

3. Constitutional Law; Taxation.—Kentucky statute taxing deposits in Kentucky banks at rate of 10 cents on $100, as compared to 50 cent rate on deposits in foreign banks, was not violative of equal protection and privileges and immunities clauses of Federal Constitution, since classification was reasonable in that its purpose was to encourage building up of deposits on tax date in banks which would be required to report and pay tax as agents for depositors (Ky. Stats., sec. 4019a-1; Constitution U. S. Amend. 14).

4. Taxation.—General deposits of Kentucky resident in New York bank held taxable by Kentucky at rate of 50 cents on $100, notwithstanding that deposits in Kentucky banks were taxable at rate of but 10 cents on $100 (Ky. Stats., sec. 4019a-1; Constitution U. S. Amend. 14).

Harry D. Kremer and Samuel H. Cole for appellant.

William Marshall Bullitt, Bruce & Bullitt, Leo T. Wolford, Middleton Miller, William H. Abell and William A. Minihan for appellee.

Opinion of the Court by Judge Stites—Reversing.

John E. Madden died on November 3, 1929, a resident of Fayette County, Ky. Shortly after his death this proceeding was filed for the purpose of taxing certain intangible personal property owned by Mr. Madden and alleged to have been omitted from assessment during the years 1924 to 1929, inclusive. The administrators of Mr. Madden's estate admitted his failure to list some of the property, and it was thereupon retroactively assessed without contest. The only questions presented for our consideration are: (1) the power of the state of Kentucky to tax securities owned by a partnership of which, Mr. Madden was a member; and (2) the rate of taxation to be applied to deposits in New York banks to the individual credit of the decedent during the period in question. The trial court held that the partnership securities, all of which were pledged with brokers on margin accounts in New York and were carried principally in "street names", had acquired a business situs in New York, and were not taxable in Kentucky. The court likewise held that the deposits in New York banks to Mr. Madden's individual account were subject to a tax of but 10 cents on the $100 (the rate applied to deposits in banks in Kentucky), and that to tax these deposits as other credits generally (at 50 cents on the $100) would be a denial of equal protection. The revenue agent has appealed. We will consider the questions in the order stated above.

For a number of years Mr. Madden was engaged in operations on the New York Stock Exchange as an equal partner with his two sons, one of whom was a resident of Oklahoma and the other a resident of Iowa. Appellant complains of this finding, and urges that certain of the brokerage accounts were operated for Mr. Madden's individual benefit; but we think the evidence amply supported the conclusion that all of these transactions in brokerage accounts were on behalf of the partnership. It was likewise established that the

operations of the partnership were conducted exclusively in New York. Mr. Madden spent the greater part of each year in New York City and personally attended to the buying and selling of most of the securities there held.

It is established that the partnership assets were invested and reinvested on the New York Stock Exchange by Mr. Madden and at times by one or the other of his two sons. Clearly, the situs of these assets for ad valorem taxation was in New York. Compare Blodgett v. Silberman, 277 U. S. 1, 48 S. Ct. 410, 72 L. Ed. 749. Whether the situs was likewise in New York for inheritance tax purposes, it is, of course, unnecessary here to decide. See Buck v. Beach, 206 U. S. 392, 27 S. Ct. 712, 51 L. Ed. 1106, 11 Ann. Cas. 732; Wheeler v. Sohmer, 233 U. S. 434, 34 S. Ct. 607, 58 L. Ed. 1030. Any doubt that may have existed by virtue of recent decisions of the Supreme Court of the United States as to whether or not the maximum of "mobilia sequuntur personam" would be invariably applied to intangible property and "business situs" no longer recognized, has been set at rest by the decision of that court in the case of Wheeling Steel Corp. v. Fox, 56 S. Ct. 773, 776, 80 L. Ed. 809 (decided May 18, 1936). The court there considered the question of the validity of an ad valorem property tax laid by West Virginia upon the accounts receivable and bank deposits in other states of a Delaware corporation having its principal office in West Virginia. In determining as a matter of fact that the methods of doing business by the corporation were such as to localize its intangible property (not taxed elsewhere), for purposes of taxation, in West Virginia, the Court said:

> "The tax is not a privilege or occupation tax.' It is not a tax on net income. See Hans Rees' Sons v. North Carolina, 283 U. S. 123, 133, 51 S. Ct. 385, 75 L. Ed. 879. It is an *ad valorem* property tax. We have held that it is essential, to the validity of such a tax, under the due process clause, that the property shall be within the territorial jurisdiction of the taxing state. This rule receives its most familiar illustration in the case of land. The rule has been extended to tangible personal property which is thus subject to taxation ex-

clusively in the state where it is permanently located, regardless of the domicile of the owner. Union Refrigerator Transit Co. *v.* Kentucky, 199 U. S. 194, 204, 206, 26 S. Ct. 36, 50 L. Ed. 150, 4 Ann. Cas. 493; Frick *v.* Pennsylvania, 268 U. S. 473, 489, 45 S. Ct. 603, 69 L. Ed. 1058, 42 A. L. R. 316. We have said that the application to the states of the rule of due process arises from the fact 'that their spheres of activity are enforced and protected by the Constitution, and therefore it is impossible for one state to reach out and tax property in another without violating the Constitution.' United States *v.* Bennett, 232 U. S. 299, 306, 34 S. Ct. 433, 437, 58 L. Ed. 612. Compare Burnet *v.* Brooks, 288 U. S. 378, 401, 53 S. Ct. 457, 77 L. Ed. 844, 86 A. L. R. 747. When we deal with intangible property, such as credits and choses in action generally, we encounter the difficulty that by reason of the absence of physical characteristics they have no situs in the physical sense, but have the situs attributable to them in legal conception. Accordingly we have held that a state may properly apply the rule mobilia sequuntur personam and treat them as localized at the owner's domicile for purposes of taxation. Farmers' Loan & Trust Co. *v.* Minnesota, 280 U. S. 204, 211, 50 S. Ct. 98, 74 L. Ed. 371, 65 A. L. R. 1000. And having thus determined 'that in general intangibles may be properly taxed at the domicile of their owner,' we have found 'no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation of more than one place similar to that accorded to tangibles.' Id., 280, U. S. 204, at page 212, 50 S. Ct. 98, 100, 74 L. Ed. 371, 65 A. L. R. 1000. The principle thus announced in Farmers' Loan & Trust Co. *v.* Minnesota has had progressive application. Baldwin *v.* Missouri, 281 U. S. 586, 50 S. Ct. 436, 74 L. Ed. 1056, 72 A. L. R. 1303; Beidler *v.* South Carolina Tax Commission, 282 U. S. 1, 51 S. Ct. 54, 75 L. Ed. 131; First National Bank *v.* Maine, 284 U. S. 312, 328, 329, 52 S. Ct. 174, 177, 76 L. Ed. 313, 77 A. L. R. 1401. But despite the wide application of the principle, an important exception has been recognized.

"In the case of tangible property, the ancient maxim, which had its origin when personal property consisted in the main of articles appertaining to the person of the owner, yielded in modern times to the 'law of the place where the property is kept and used.' First National Bank *v.* Maine, *supra*. It was in view 'of the enormous increase of such property since the introduction of railways and the growth of manufacturers' that it came to be regarded as 'having a situs of its own for the purpose of taxation, and correlatively to exempt at the domicile of its owner.' Union Refrigerator Transit Co. *v.* Kentucky, *supra*, 199 U. S. 194, at page 207, 26 S. Ct. 36, 39, 50 L. Ed. 150, 4 Ann. Cas. 493. There has been an analogous development in connection with intangible property by reason of the creation of choses in action in the conduct by an owner of his business in a state different from that of his domicile. New Orleans *v.* Stempel, 175 U. S. 309, 20 S. Ct. 110, 44 L. Ed. 174; Bristol *v.* Washington County, 177 U. S. 133, 20 S. Ct. 585, 44 L. Ed. 701; State Board of Assessors *v.* Comptoir National, 191 U. S. 388, 24 S. Ct. 109, 48 L. Ed. 232; Metropolitan Life Insurance Co. *v.* New Orleans, 205 U. S. 395, 27 S. Ct. 499, 51 L. Ed. 853; Liverpool & L. & G. Insurance Co., *v.* Board of Assessors for Parish of Orleans, 221 U. S. 346, 31 S. Ct. 550, 55 L. Ed. 762, L. R. A. 1915 C. 903.

"These cases, as we said in Farmers' Loan & Trust Co. v. Minnesota, *supra*, 280 U. S. 204, at page 213, 50 S. Ct. 98, 101, 74 L. Ed. 371, 65 A. L. R. 1000, 'recognize the principle that choses in action may acquire a situs for taxation other than at the domicile of their owner, if they have become integral parts of some local business.' We adverted to this reservation in Beidler *v.* South Carolina Tax Commission, *supra*, 282 U. S. 1, at page 8, 51 S. Ct. 54, 75 L. Ed. 131, and in First National Bank *v.* Maine, *supra*, 284 U. S. 312, at page 331, 52 S. Ct. 174, 76 L. Ed. 313, 77 A. L. R. 1401."

Applying these principles to the case at bar, we are compelled to recognize that the business of the Madden partnership was localized in New York. All of the partnership

accounts were carried with brokers there, the securities purchased and sold were carried in the names of New York brokers, and the trading was almost universally carried on in person by Mr. Madden at the brokerage offices. In fact, the testimony indicates that he was more often sojourning in New York than in his technical legal residence in Kentucky. We conclude, therefore, that Mr. Madden's interest in the assets of the partnership was localized in New York and beyond the power of Kentucky to tax. His interest in the going partnership was not a thing apart from the partnership itself.

As to the taxation of general deposits in the name of Mr. Madden in New York banks, no question of situs is presented. It is admitted that these deposits are taxable in Kentucky, but it is urged that the rate to be applied must be that fixed on deposits in banks organized under the laws of this state or national banks doing business in this state, and that to apply to these deposits the rate applicable to intangible property generally is to deny to appellee the equal protection of the law secured to him by the Fourteenth Amendment to the Constitution of the United States. Whether or not this contention is correct must depend, of course, upon the reasonableness of the classification made by section 4019a-1 of the Kentucky Statutes, placing the deposits in banks, resident in this state, in a separate class for purposes of taxation, and fixing thereon a rate of but 10 cents on the $100, as compared to the 50 cent rate applicable to intangibles generally.

It cannot be disputed that the classification made by section 4019a-1 is limited by its terms to the banks organized under the laws of this state and national banks doing business here. The deposits in nonresident banks, therefore, must be taxed at the general intangible rate unless to do so would be contrary to the Fourteenth Amendment. Perhaps the most quoted discussion of the rules applicable to classification for taxation under the equal protection clause is found in the case of Bell's Gap R. Co. *v.* Pennsylvania, 134 U. S. 232, 10 S. Ct. 533, 535, 33 L. Ed. 892, where the court said:

> "The provision in the fourteenth amendment, that no state shall deny to any person within its jurisdiction

the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the state in framing their constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject that would include all cases. They must be decided as they arise. We think that we are safe in saying that the fourteenth amendment "was not intended to compel the states to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the states, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material, but it would render nugatory those discriminations which the best interests of society require; which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice; and which every state in one form or another, deems it expedient to adopt."

Again, in Watson *v.* State Comptroller, 254 U. S. 122, 41 S. Ct. 43, 44, 65 L. Ed. 170, it is said:

"Any classification is permissible which has a reasonable relation to some permitted end of governmen-

tal action. * * * It is enough, for instance, if the classification is reasonably founded in 'the purposes and policy of taxation.'"

Plainly, the placing of local bank deposits in a separate class, and according to them a more favorable rate than is assessed against other intangible property, "is reasonably founded in the purposes and policy of taxation." At the time that the 1917 classification law was enacted (Acts 1917, c. 4), following the amendment to section 171 of the State Constitution (see Acts 1914, c. 94), the Legislature had before it the report of the Special Tax Commission, which showed that, under the old general property tax, out of $123,000,000 of bank deposits in the state, only $12,847,868—or a little over 10 per cent—were returned for taxation (Report, Special Tax Commission, 1912-1914). It was likewise a matter of general information that a large part of the money on deposit in banks went into hiding on the tax date and there was a corresponding contraction in the assets of the banks at a time when crops were moving, and an increase, rather than a decrease, a credit was necessary. In order to meet this economic situation, as well as the practical exigencies of taxation, a rate was fixed sufficiently low to encourage the building up of deposits on the tax date, and the banks were required to report and pay the tax on this species of property as agents for their depositors. The reasonableness of this provision is demonstrable in the fact that more taxes are actually raised under the lower rate than were paid when the full rate was applied under the old general property tax law. Obviously, therefore, the classification is a valid one so far as it affects property within the state.

It is argued however, that the deposits in nonresident banks must be accorded the same favorable classification, and we are cited to the recent decision of the Supreme Court of the United States in the case of *Colgate* v. *Harvey*, 296 U. S. 404, 56 S. Ct. 252, 256, 80 L. Ed. 225, 102 A. L. R. 54, wherein a statute of Vermont was held to violate the privileges and immunities clause of the Federal Constitution in taxing the income derived from loans outside of the

state while exempting similar loans made within the state. However, the opinion of the court in that case itself states the distinguishing feature between that case and this. The court said:

> "We are unable to find in the provision any public purpose which can be subserved by making the taxation of income from loans dependent merely upon the adventitious circumstance as to the place of making the loan."

In the case at bar there is an obvious public purpose to be subserved and an obvious *quid pro quo* to be received by the state from its local banks as distinguished from nonresident banks. There is no way of guaranteeing that deposits in banks of mother states will be reported for taxation by those banks or that the tax will be *re*paid by such banks and charged to the account of the depositor, as is the case with local banks. Similarly, there is no public reason for seeking to build up the deposits in nonresident banks on the taxing date, and consequently no reason why the deposits in nonresident banks should be accorded a privilege not granted to other credits generally. There is no "clear and hostile discrimination" embodied in section 4019a-1 directed against deposits in nonresident banks. Any discrimination that exists is merely ineidental to a legitimate classification, and results simply from the lack of power in the state to reach banks beyond its jurisdiction, and from the absence of the sound economic reasons which justify the classification when applied to domestic banks but which fail when extended beyond the boundaries of the state. A nonresident who deposits his money in a Kentucky bank, and permits it to acquire a taxable *situs* here, is accorded the same favorable rate that is fixed on the deposit of a resident of this state. If a resident of this state chooses to place his funds in a foreign bank, he, in effect, himself selects the classification of his property for taxation. *Metropolis Theatre Co.* v. *Chica-o,* 228 U. S. 61, 33 S. Ct. 441, 57 L. Ed. 730. We can find in these facts no denial of equal protection nor any abridgement of privileges and immunities.

It follows that the judgment of the trial court is erroneous in so far as it applies the 10 cent rate instead of the 50 cent rate to the deposits of Mr. Madden in the New York banks.

Judgment reversed for proceedings consistent herewith.

EXHIBIT "B".

John E. Madden's Executor v. Commonwealth of Kentucky, by James W. Martin, Commissioner of Revenue, 277 Ky. 343, 126 S. W. (2d) 343.

(Decided March 10, 1939.)

Appeal from Fayette Circuit Court.

Opinion of the Court by Com. Morris—Affirming.

This case is before us on a second appeal. Commonwealth v. Madden's Exr., 265 Ky. 685, 97 S. W. (2) 561. Reference thereto will show that the court held the bank deposit of decedent in banks outside of Kentucky subject to the rate of fifty cents per $100.00, as in other intangible property (Section 4019a-10) and not as provided by Section 4019a-1, Kentucky Statutes, fixing the rate on deposits in domestic banks at ten cents per $100.00.

We reversed so much of the judgment of the lower court as held the statute contrary to the provisions of the Federal Constitution, which was the sole issue before the lower court and here on this phase of the case. On a remand for a new trial for proceedings consistent with our opinion, appellant tendered an amended answer, which was filed without objection, and to which appellee replied, denying its allegations, save such as plead that decident was a citizen of the United States and Kentucky.

The court overruled appellee's motion to strike the answer from the files. Counsel for appellee is now complaining of the court's ruling, because following reversal it came too late, and injected new matter which might have been plead in the former defensive pleadings. Our conclusions,

later expressed, obviate the necessity of passing on this technical question, since it is doubtful if the amendment presented any new defensive matter, it being as we view it a mere elaboration of the legal defense set up in the former pleadings. (Civil Code, Section 134.) Furthermore, the issue presented was fully considered and decided in the former opinion. Counsel for appellee contends that the first opinion is the law of the case.

After pleading (the admitted fact) that decedent was a citizen of the United States, and a citizen and resident of Kentucky, appellant averred that to construe the statutes so as to impose the higher rate on deposits in foreign banks than on deposits in domestic banks, as we had done, violated Section 2 of Article 4 of the United States Constitution, and Section 1 of the 14th Amendment, which respectively provide in part:

> "The citizens of each state shall be entitled to all privileges and immunities of citizens of the several states. * * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

It appears from appellant's pleadings that counsel had relied on so much of the 14th Amendment to the Federal Constitution as prohibited the taking of property without due process of law, and as guaranteed equal protection of the laws.

In the brief, which is in the nature of a petition for rehearing, it is contended that in view of the ruling of the Supreme Court, in the case of Colgate v. Harvey, 296 U. S. 404, this court should reconsider and reverse its finding, insisting that the Colgate case, is controlling, and that the "law of the case" rule should not be applied "where a question of constitutional law is involved, as no former decision can prevail over the Constitution."

Reading the opinion it is perceivable that in considering this phase of the case the court did so with the Colgate opinion before it, adverted to and quoted from it, discussing the question at hand in its light and the light of those pro-

visions of the Federal Constitution set up in the final pleading.

Appellant after filing amended answer, and upon appellee's motion for judgment in conformity with the opinion, moved the court to make separate findings of fact and conclusions of law, and the court in response to the request wrote:

> "On the first trial of this cause, this Court found the fact to be with reference to the assessment of bank accounts by the State of Kentucky, as follows:
>
> > " 'It is the universal practice in Kentucky to assess bank accounts at the rate of 1/10 of 1% based upon the amount of such deposits on July 1, of each year, and such universal practice prevailed during the years 1924 to 1929, inclusive.'
>
> "In the opinion of the Court of Appeals herein handed down June 23rd, 1936, such finding of this court was not reversed or disapproved, and as there was no contrary evidence offered on the second trial, the said finding of this Court on the first trial is hereby re-adopted and reaffirmed.
>
> 1. The decedent * * * was a citizen of the United States as well as a citizen of the State of Kentucky, and under the Constitution of the United States, Article IV, section 2, and the Fourteenth Amendment thereto, Section 1, no state law can be made or enforced which will abridge the privileges and immunities of a citizen of the United States. The assessment and collection of taxes by the State of Kentucky upon bank accounts kept by a citizen thereof in banks outside the State of Kentucky, at a higher rate than that applied to bank accounts kept within the State of Kentucky, is discriminatory and violates the said provisions of the Constitution of the United States.
>
> "2. Since, as found by this Court upon the first trial it is, and was, during the years 1924 to 1929, inclusive,

the universal practice in Kentucky to assess bank accounts at the rate of 1/10th of 1% of the amount of deposits on July 1st of each year, the assessment and collection of taxes aaginst this defendant at a higher rate of taxation than has been applied, by such universal practice, to other taxpayers within the State of Kentucky, has the effect of denying to this defendant due process of law and the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The finding of fact as stated by the court would have been more accurate and conformable to the proof had it read,

> "* * * it was, during the years involved, the practice in Kentucky to levy the rate of 1/10th of 1% on all deposits in Kentucky banks as of July 1st each year, and to levy the higher rate on deposits by residents of Kentucky in foreign banks."

Notwithstanding this expression of his conclusions of law, the court following the mandate, entered judgment against appellant for taxes covering the several years involved, applying the higher rate provided by the statute, supra, and it is solely from this judgment the appeal is prosecuted.

In assessing bank deposits in and out of the State, officers charged with such duties followed the provisions of the statute (Sections 4019a-1, 4019a-10) and applied the respective provided rates. With the correction indicated we have no hesitancy in approving the finding of fact by the chancellor as to methods applied during the respective years involved.

However, we cannot lend our approval to the conclusions of law expressed by him. The facts adverted to by the lower court were in the mind of this court in passing on the question presented. We expressly determined that the provisions of the Federal Constitution relied on by appellant were not violated. The conclusions of law thus are in the face of our former decision. We adhere to the conclusion reached on the former hearing and as expressed in our

opinion. The chancellor's judgment conformed to our mandate on the first appeal even though his conclusions of law did not.

Judgment affirmed.

Attorneys for Appellant:

WILLIAM MARSHALL BULLITT, Louisville, Ky.
LEO T. WOLFORD, Louisville, Kentucky.
WILLIAM A. MINIHAN, Lexington, Ky.

Attorney for Appellee:

HARRY D. KREMER, Lexington, Ky.

HJW.